

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 28, 2013

Diane M. Fremgen
Clerk of Court of Appeals

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Appeal No. 2012AP505-CR

Cir. Ct. No. 2010CF1643

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TAVORIS A. MURPHY, SR.,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dane County: NICHOLAS McNAMARA, Judge. *Affirmed.*

Before Lundsten, P.J., Sherman and Kloppenburg, JJ.

¶1 KLOPPENBURG, J. The evening before trial was to begin, the prosecutor disclosed to defense counsel a letter purportedly from Tavoris Murphy, Sr., to one of his witnesses outlining her expected testimony. The circuit court ruled that the letter would not be excluded as rebuttal evidence, and neither the

witness nor Murphy testified. Murphy argues that the State's eve-of-trial disclosure violated the discovery statute, the discovery violation lacked good cause and so required that the letter be excluded, and the circuit court's erroneous ruling that the letter was admissible as rebuttal evidence was not harmless. Murphy contends that he is entitled to a new trial, and he appeals from a judgment convicting him of selling cocaine and possessing additional cocaine with intent to distribute, and from an order denying his postconviction motion for a new trial. We affirm. We need not address the discovery issues that Murphy raises because we conclude that, even if the circuit court erred when it ruled that the letter was admissible as rebuttal evidence, such error was harmless.

Background: Jury Trial

¶2 Murphy was accused of selling cocaine to James Jesse near the Metropolitan Place Apartment building in Madison on October 1, 2010. He was also charged with possessing additional cocaine with intent to distribute, when cocaine was found in a police squad car after he was arrested on State Street later that day. The charges were tried before a jury on January 4, 2011.

¶3 Six witnesses testified for the State about the events on October 1, 2010. The first witness, Metropolitan Place Apartment owner Clifford Fisher, testified that while he was standing in the lobby of the building, he saw a white woman (later identified as Becky Field) get out of a parked black Monte Carlo, in which a black man was sitting. Fisher then saw one of his tenants, James Jesse, walk by him out of the building and get in the car with the man already in the car. The car door was left open, and Fisher saw Jesse and the man in the car "switching stuff." Jesse left the car with something clenched in his hand and returned to the building with the woman. Fisher asked Jesse what was in his hand, telling Jesse

that Jesse would be “booted out” if Jesse did not tell him. Jesse showed Fisher a baggie with “white stuff,” and Fisher called the police. The contents of the baggie were later identified as cocaine.

¶4 Fisher had told the first police officer to arrive that Fisher had seen a black man and white woman go in the apartment building, then James Jesse leave the apartment building with something in his hand, and Fisher approached Jesse at that point, and then called the police.

¶5 As Fisher called the police, he saw the black man leave the car and walk down the street. Fisher told his manager to follow the man. Fisher then went to Jesse’s apartment with the police officers, and Jesse was in the apartment with the woman. When the police returned with Murphy in their squad car, Fisher identified him as the person he had seen in the Monte Carlo because of the multicolored, vertically-striped jacket he was wearing. One of the police officers, Officer Dean Baldukas, later testified, and a video recording also showed, that the police had taken off the jacket and placed it in front of the squad car before returning with Murphy to the apartment building.

¶6 The second witness, James Jesse, testified that he and Becky Field “got mixed up with ... buying ... cocaine from” a man he called “Bishop.” Other testimony showed that “Bishop” was Murphy.¹ Jesse testified that Fisher saw Murphy handing something to Jesse in Murphy’s car at the corner, and that Jesse gave Murphy thirty dollars and Becky Field gave Murphy twenty-five dollars.

¹ From this point on, although witnesses Jesse and Field used the name “Bishop” to refer to Murphy, we will recite the facts as if they had used his correct name to avoid confusion.

Officer Baldukas later testified that Jesse told him that he bought the cocaine from a Hispanic man at Perkins Restaurant. Jesse testified that all of the charges against him relating to the October 1, 2010 incident were dismissed after his arrest.

¶7 The third witness, Becky Field, testified that she had known Murphy for nine years and called him to give her a ride to her mental health agency, where she met James Jesse and they each obtained forty dollars. Field testified that she and Jesse got in “[Murphy’s] car” and Murphy drove them to Jesse’s apartment. Field testified that she got out of the car, and Jesse and Murphy stayed in the car for quite some time, doing a drug deal. She testified that when Jesse finally got out, they met the manager in the lobby, he asked Jesse what was in his hand, and Jesse told him it was crystal meth, but it was really crack cocaine. Field testified that the manager took Jesse’s cocaine, but she kept the cocaine for which she had paid.

¶8 The fourth witness, Officer Baldukas, testified that after hearing from Fisher’s manager, the officer identified Murphy at a store on State Street by his colorful jacket, handcuffed and frisked Murphy for weapons (after Murphy said he did not have an ID and would not allow himself to be searched), and brought him to the squad car. Baldukas identified Murphy in the courtroom as the man he had detained.

¶9 Baldukas testified that at Murphy’s request Murphy was placed in the back seat of the squad car, where Murphy was then seen lying on his side and moving really quickly. Baldukas opened the door and asked what Murphy was doing, and Murphy said the handcuffs did not fit and he wanted to get out of the car and the officer could search him. Baldukas then searched Murphy’s person.

¶10 During Baldukas' testimony, defense counsel played a video recording of Murphy's detention. The video showed that Baldukas searched Murphy's person before Murphy was placed in the back seat of the squad car and was seen moving around furtively.

¶11 During the search of Murphy's person before Murphy was seated in the back seat of the squad car, Baldukas found Murphy's ID, cell phone and \$125 cash. Baldukas testified that he called the number that Field had given him as Murphy's and Murphy's cell phone rang.

¶12 Baldukas testified that after he had Murphy come out of the car, another officer looked underneath the squad car's back seat cushion two times, a K-9 dog sniffed the car, and the officers searched Murphy again and removed his jacket.

¶13 Baldukas testified that he then drove Murphy back to the apartment building with Murphy in the back seat; after Murphy exited the car, the K-9 dog sniffed the car again, and the police found a plastic baggie with two cubes of cocaine base under the front passenger seat in the squad car. Baldukas testified that he also then searched the Monte Carlo, and found two scales and a cell phone. Baldukas testified that drug dealers often have more than one cell phone and use scales to package and sell drugs in proper amounts.

¶14 The fifth witness, forensic scientist Marty Koch, testified that the material in the baggies taken from Jesse and the squad car was cocaine.

¶15 The sixth witness, Officer Dailey, testified that Becky Field identified Murphy from a photo array, and that James Jesse identified a person other than Murphy from a photo array.

Background: Discovery Disclosure

¶16 In his report dated October 1, 2010, Officer Baldukas identified the owner of the Monte Carlo as Julie DeKeyser. He also reported that Murphy told him that he had recently helped a friend named Holly DeKeyser move. Baldukas asked Murphy if he meant to say that he had received payment for his assistance in helping DeKeyser, and Murphy said yes. Murphy intended to call Holly DeKeyser as a defense witness.

¶17 After jury selection, at 5:30 p.m. on January 3, 2011, the State emailed a copy of a letter to defense counsel. It was postmarked October 25, 2010, and purported to be a letter from Murphy to defense witness Holly DeKeyser, outlining her anticipated testimony.

¶18 A Madison police officer had discovered the letter in a lost purse that the officer found on November 20, 2010. The purse also contained marijuana and identification cards for Tavoris Murphy and Holly DeKeyser. The letter was mailed from the Dane County Jail.

¶19 The police informed the prosecutor of the letter on December 21, 2010, and the prosecutor asked for a copy of the letter. The prosecutor received the copy of the letter on January 3, 2011, and provided defense counsel with a copy at 5:30 p.m. on that same date, the evening before trial.

¶20 At the close of the State's case, defense counsel asked the court to rule the letter inadmissible. The State had told the court that it planned to use the letter only as impeachment if DeKeyser or Murphy testified. The circuit court ruled that the letter would be admissible, finding no unfair surprise to Murphy

since he had written the letter and no bad faith by the State given the intervening holidays between December 21, 2010 and January 3, 2011.

¶21 After receiving the letter on the eve of trial, defense counsel informed Holly DeKeyser that she would not be called to testify. DeKeyser would have testified that she drove Murphy downtown that morning, and that she had paid him cash for helping her move a day or two earlier. After the circuit court ruled that the letter would be admissible at trial, Murphy waived his right to testify. Murphy would have testified how he met Becky Field that day, that she already had drugs and they were smoking drugs together when they met James Jesse and Jesse wanted to do drugs and had drugs in his apartment, and that they went to Jesse's apartment building and Murphy went to the car to get his coat.

Discussion

¶22 Murphy argues on appeal that the circuit court erred when it (1) found that the state showed good cause for its late disclosure of the letter, (2) ruled that the letter would be admissible as rebuttal evidence, and (3) determined that its ruling of admissibility even if erroneous was harmless. We need not address the first two issues because we conclude that, even if the circuit court erred when it ruled that the letter was admissible as rebuttal evidence, the error was harmless.

¶23 The erroneous admission of evidence is harmless if it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error. *State v. Harris*, 2008 WI 15, ¶42, 307 Wis. 2d 555, 745 N.W.2d 397.

¶24 As noted above, the erroneous failure to exclude the DeKeyser letter from admission at trial kept Holly DeKeyser's testimony from the jury, and was an

important factor in Murphy's decision not to testify (Murphy had not yet decided whether to testify when the letter was disclosed). Murphy argues that DeKeyser's testimony, along with Murphy's own, would have provided an alternative narrative to critical aspects of the inconsistent and compromised testimony of the State's witnesses, sufficient to undermine confidence in the jury's verdict. *See State v. Rice*, 2008 WI App 10, ¶19, 307 Wis. 2d 335, 743 N.W.2d 517 ("[T]he error must be sufficient to undermine our confidence in the outcome" (citation omitted)). However, DeKeyser's and Murphy's anticipated testimony would have failed to contradict key components of the State's case, thereby refuting Murphy's argument.

¶25 The jury already weighed the credibility of the State's witnesses in light of all of the credibility problems that they presented—including Fisher's inconsistent stories as to whether he stopped Jesse coming or going out of the apartment building and his reference to the colorful coat which was not on Murphy when the police brought him back to the apartment building, Officer Baldukas' partially inaccurate testimony corrected by the video as to the sequence of the search of Murphy's person and his being left alone in the squad car, Fisher's saying that he saw Jesse walk out to the car and Field's saying that she and Jesse got a ride to the apartment building with Murphy and she stood outside the car and then went in with Jesse, Jesse's different stories as to whom he bought the cocaine from and the dismissal of the charges against him and his failure to identify Murphy in the photo array, and Field's twenty-six convictions—and Holly DeKeyser's and Murphy's anticipated testimony would not have aggravated those weaknesses. Rather, their anticipated testimony would have added the ultimately inconsequential details that DeKeyser drove Murphy downtown after which Murphy did drugs with Field and returned to the car to get his coat while Field and

Jesse went to Jesse's apartment, and that DeKeyser had paid Murphy for helping her move a day or two earlier.

¶26 Murphy argues that DeKeyser's anticipated testimony in particular was important in two specific ways. First, her anticipated testimony as to her driving the car (buttressed by Murphy's anticipated testimony to the same) would have weakened the inferences suggested by the prosecution that the scales and phone in the car were Murphy's and were indicative of drug dealing. Second, her anticipated testimony as to her having paid Murphy for helping her move would have provided a source other than dealing drugs for the cash found on Murphy's person when he was detained. However, Murphy's argument does not withstand closer scrutiny.

¶27 Notably absent from DeKeyser's and Murphy's anticipated testimony would have been any statements about ownership of the car or the scales and cell phone in the car. Defense counsel expressly testified that she would not have asked DeKeyser who owned the car or the cell phone in the car, so that any inferences that those items were hers and not Murphy's would not even have been suggested by DeKeyser's testimony on direct examination.² Nor would anything that Murphy planned to say on direct examination have counterbalanced the State's evidence as to what Murphy did in the car while he was in it. The only counterweight to the testimony of the State's witnesses would have been an alternate explanation of at least some of the money in Murphy's pocket. That one

² Moreover, Murphy could have established through Officer Baldukas that the car was owned by someone other than Murphy.

piece of countervailing evidence does not suffice to undermine our confidence in the outcome of the trial.

¶28 In sum, we conclude that the circuit court's decision not to exclude the DeKeyser letter from admission at trial, even if erroneous, did not prejudice Murphy.

Conclusion

¶29 Based on the foregoing, we affirm the judgment of conviction and the order denying Murphy's postconviction motion for a new trial.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.

